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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JERRY MULLENS, Defendant and Appellant.	B206502 (Los Angeles County Super. Ct. No. BA323548)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Modified and, as so modified, affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jerry Mullens appeals from the judgment entered following a jury trial that resulted in his convictions for attempted willful, deliberate, and premeditated murder and shooting at an occupied motor vehicle. The trial court sentenced Mullens to life in prison, plus 20 years.

Mullens contends the evidence was insufficient to prove premeditation and deliberation, and to support the jury's finding the crimes were committed for the benefit of a criminal street gang. The People contend the judgment should be modified to impose two, rather than one, court security fees. We order the judgment modified as requested by the People, and in all other respects affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's case.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following.

(i) *The May 2007 shooting.*

Appellant Mullens was a member of the "All for Crime" criminal street gang, a Black gang also known as "AFC." One of Mullens's gang monikers was "Green Eyes," apparently due to his eye color. As of May 2007, AFC was engaged in a gang "war" with a rival Hispanic gang, "38th Street." Both gangs claimed the area of Ascot and 42nd Streets as their territory. Mullens often wore red and white plaid shirts, both colors associated with the AFC gang.

Victim Henry Espinosa, who was 19 years old, was not a member of a gang. Espinosa routinely drove the same route through the neighborhood of 42nd and Ascot, at approximately the same time each morning, on his way to work. Espinosa had seen Mullens walking in the neighborhood on approximately 11 occasions during his morning commute.

Espinosa saw Mullens when he drove through the neighborhood on May 20 and May 21, 2007. Both times, Mullens stopped and stared at Espinosa as Espinosa drove past. On May 22, 2007, at approximately 6:50 a.m., Espinosa was again on his way to work, driving at approximately 20 miles per hour northbound on Ascot. Suddenly Mullens "popped out" from between two parked cars and jogged into the street, causing Espinosa to slow to avoid running Mullens over. When he was centered in front of Espinosa's vehicle, Mullens reached into his waistband, pulled out a handgun, and pointed it at Espinosa. Espinosa ducked and stepped on the gas. Mullens fired approximately six shots at Espinosa, striking Espinosa's car repeatedly. Mullens continued jogging across the street. One of the shots hit and broke the driver's side window; a bullet also hit the driver's seat. Fortuitously, Espinosa suffered only two superficial graze wounds to his back. Mullens was wearing a red and white checkered shirt during the attack. Espinosa drove home, and his father alerted police.

Espinosa described the shooter to police, including the fact he had green eyes, and was known by the moniker "Green Eyes." Espinosa positively identified Mullens in a six-pack pretrial photographic lineup, at the preliminary hearing, and at trial.

(ii) *Gang evidence.*

Police Officer Steven Ralph testified as a gang expert for the People, as follows. Mullens was an active member of the AFC gang. AFC is a "Blood" gang and its members often wear red. AFC members refer to themselves as "hustlers," and are focused toward making money, primarily through narcotics sales. In addition to narcotics sales, the AFC gang was also involved with weapons possession, murder, attempted murder, shootings, and graffiti.

Gangs establish their "turf" by "tagging" an area with graffiti and by intimidating neighborhood citizens and rival gang members. In this way, they are able to establish an area where they can safely engage in their criminal enterprises without interference from police or other gangs. Gang members generally use threats and intimidation to communicate to rival gangs that they are willing to protect their turf. The AFC gang used violence to protect its narcotics sales from rival gang members coming into the area.

Gang members earn "respect" in their gangs by "put[ting] in work for the gang," i.e., committing crimes such as robbery, shootings, murder, "anything to protect the boundary . . . ." A gang member's reputation is of crucial importance in his own gang and vis a vis other gangs.

The area where the shooting occurred was "in the heart of AFC territory." The 38th Street gang "claim[ed]" some of the territory claimed by AFC, which caused tension between the gangs. Beginning in May 2007, the 38th Street and AFC gangs had a falling out related to narcotics transactions. Tension escalated between the two gangs. Threats and gang fights, as well as seven documented incidences of attempted murders between the gangs and one homicide, had ensued.

If a rival gang member, or someone perceived to be a rival gang member, entered another gang's area, the individual would likely be confronted with threats and intimidation and could be "shot, stabbed, killed for being in the wrong area." "[S]taring down" a rival gang member as he drives through the neighborhood is a form of intimidation to communicate that the gang knows the rival is present, and if he passes through the area again, he might be shot or attacked.

When asked a hypothetical question based on the facts of the case, Ralph opined that the shooting was committed to benefit the AFC gang. First, the shooting served to intimidate neighborhood residents. The fact that a gang member committed the shooting on a main street in broad daylight, without fear of being caught, showed arrogance. Such actions enhanced the reputation of the gang and the shooter. Second, there was an ongoing dispute between the AFC and 38th Street gangs. If an AFC gang member shot and killed a rival gang member driving through AFC territory, this would enhance AFC's reputation for protecting its turf, and might also discourage attacks by the 38th Street gang.[1]

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[1] Ralph also testified regarding predicate crimes committed by other AFC members and the gang's primary activities. As the sufficiency of this evidence is not challenged, we do not describe it here.

b. *Defense case.*

Mullens presented an alibi defense. Mullens, his aunt, and his brother testified that he was at home at the time the shooting occurred. Mullens admitted that he had been an AFC member for seven years, that he visited the area near where the shooting occurred nearly every day, that the area was a hangout for AFC members, and that there had been shootings between the AFC and 38th Street gangs. If persons he suspected of being 38th Street gang members drove through the neighborhood, he would stare at them to be sure they were not going to shoot at him.

2. *Procedure.*

Trial was by jury. Mullens was convicted of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a))[2] and shooting at an occupied motor vehicle (§ 246). The jury further found Mullens intentionally discharged a handgun (§ 12022.53, subd. (c)), and committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced Mullens to life in prison, plus 20 years. It awarded victim restitution and imposed a restitution fine, a suspended parole restitution fine, and a court security fee. Mullens appeals.

DISCUSSION

1. *The evidence was sufficient to support the jury's finding that the attempted murder was deliberate, willful, and premeditated.*

Mullens urges that the evidence was insufficient to support the jury's finding that the attempted murder was premeditated, willful, and deliberate. He urges that there was no evidence of planning or motive, no evidence he was lying in wait, no evidence he bore animosity toward Espinosa or believed him to be a rival gang member, and no evidence he had a "preconceived plan to track down and fire upon" Espinosa. Instead, Mullens theorizes that he simply crossed the street without looking and shot at Espinosa's vehicle because he was startled, in "a self-defense mode," and perceived Espinosa's vehicle as a danger. Further, Mullens points out that Espinosa was only grazed by the bullets; the

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[2] All further undesignated statutory references are to the Penal Code.

shots were not fired at point blank range; and most shots hit the exterior of the vehicle, not endangering Espinosa.

We find these arguments unpersuasive. When determining whether the evidence was sufficient to sustain a criminal conviction, we review the entire record in the light most favorable to the judgment to determine " 'whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640; *People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) " 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) " 'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.' " (*People v. Halvorsen*, *supra,* at p. 419.)

In *People v. Anderson* (1968) 70 Cal.2d 15, our Supreme Court stated that "generally first degree murder convictions are affirmed when (1) there is evidence of planning, motive, and a method of killing that tends to establish a preconceived design; (2) extremely strong evidence of planning; or (3) evidence of motive in conjunction with either planning or a method of killing that indicates a preconceived design to kill." (*People v. Mincey* (1992) 2 Cal.4th 408, 434-435; *People v. Romero* (2008) 44 Cal.4th 386, 401.) "These factors are not the exclusive means, however, to establish

premeditation and deliberation; for instance, 'an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 172; *People v. Lenart* (2004) 32 Cal.4th 1107, 1127.)

" 'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation . . . does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .' [Citations.]" ' [Citation.]" (*People v. Halvorsen, supra,* 42 Cal.4th at p. 419; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Here, the evidence was sufficient. *People v. Romero, supra*, 44 Cal.4th 386, is instructive. In *Romero,* the victim, a member of the Temple Street gang, was watching a movie in a video store. He was wearing a football jersey with lettering suggesting his gang affiliation. As the victim stood next to the video store counter, the defendant, a member of the rival Rockwood gang, entered the store and fired a shot into the back of the victim's head at point blank range, killing him. (*Id.* at p. 393.) *Romero* held this evidence was sufficient to support the jury's finding of premeditation and deliberation. (*Id.* at p. 401.) The court explained there was evidence from which the jury could infer planning, in that the defendant "brought a gun to the video store where, without any warning or apparent awareness of the impending attack, [the victim] was shot in the back of the head." (*Ibid.*) Further, there was evidence of motive. A gang expert testified that at the time of the murder, the Rockwood and Temple gangs were rivals. The victim was wearing a shirt indicating membership in the Temple gang. The expert explained that killing a member of a rival gang would elevate the killer's status within the gang. (*Ibid.*) Finally, the manner of the killing suggested premeditation and deliberation. The victim "was killed by a single gunshot fired from a gun placed against his head. . . . [T]his

execution-style manner of killing supports a finding of premeditation and deliberation when, as here, there is no indication of a struggle." (*Ibid.*)

The instant case is similar. There was evidence from which the jury could infer planning. Espinosa drove the same way to work each day, at roughly the same time. He had seen Mullens repeatedly in the neighborhood. On each of the two days prior to the shooting, Mullens stopped and stared at Espinosa as Espinosa drove past. Mullens admitted he would stare at a driver if he believed he might be a 38th Street gang member. Espinosa, while not a gang member, was 19 years old and Hispanic, and the jury could infer Mullens mistook him for a member of a rival gang. As in *Romero*, Mullens had armed himself with a gun before the shooting. Mullens jumped out from between two parked cars, causing Espinosa to slow and making him a more vulnerable target. The shooting was committed with no warning and no provocation. The jury reasonably could infer Mullens expected Espinosa to drive past in the morning, armed himself, waited until Mullins happened by, and then committed the shooting with the intent to kill Espinosa, whom he perceived as a rival gang member, or at least a nonmember of his gang.

The same evidence suggested a motive for the shooting. It was undisputed that Mullens was a member of a gang which was at "war" with a rival Hispanic gang. Tension between the gangs had grown and resulted in fights, attempted murders, and a homicide. As noted, Espinosa was 19 years old and Hispanic, and was on AFC turf. If Mullens perceived Espinosa as a rival gang member in AFC territory, shooting him would enhance Mullens's and the gang's reputation.

Finally, the manner of the attempted killing strongly suggested premeditation and deliberation. Mullens shot at Espinosa from close range, i.e., a distance of approximately 11 feet. He fired not just one, but five or six, shots, "far more than would occur from an unplanned or accidental firing." (*People v. Hererra* (1999) 70 Cal.App.4th 1456, 1464.) Those shots were aimed at Espinosa. One bullet hit and shattered the drivers' side window. A bullet also ripped into the driver's seat cushion. Other bullets hit the drivers' side front and back panels, the driver's side headlight, and the vehicle's hood. One of the bullets grazed Espinosa's back. There was no struggle between the men and no

provocation for the shooting. In short, the shooting was akin to an execution-style attempted killing that strongly suggested calculation and premeditation. (See *People v. Romero, supra,* 44 Cal.4th at p. 401; *People v. Tafoya, supra,* 42 Cal.4th at p. 173; *People v. Lenart, supra,* 32 Cal.4th at p. 1127.) The fortuitous fact Espinosa reacted quickly and was able to duck out of the way, or perhaps that Mullens was a poor marksman, does nothing to undercut the sufficiency of the evidence of premeditation and deliberation on the facts presented here.

Mullens's arguments fail to persuade us the evidence was insufficient. The alternative scenario suggested by Mullens – that he shot at Espinosa because he was startled and concerned for his safety after he encountered Espinosa's vehicle – is highly implausible given the record before us. In any event, Mullens's argument amounts to a request that we reweigh the evidence on appeal. That is not the function of an appellate court. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Maury* (2003) 30 Cal.4th 342, 403.)

Nor does Mullens's citation to *People v. Herrera, supra,* 70 Cal.App.4th 1456 and *In re Sergio R.* (1991) 228 Cal.App.3d 588, assist him. Mullens urges that in these cases, the evidence of premeditation and deliberation was stronger than that presented here. But the fact more, different, or stronger evidence may have been present in other cases does not establish the evidence was insufficient here; each case must be considered on its own facts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.)

2. *The evidence was sufficient to support the jury's finding that the crimes were committed for the benefit of a criminal street gang.*

Mullens urges the evidence was insufficient to prove the crimes were committed for the benefit of a criminal street gang. He contends that while the evidence showed he was a gang member, it "fell far short of indicating the crime was committed to benefit any gang." For example, no gang slogans or gang signs accompanied the shooting. Under these circumstances, he asserts, the expert's testimony was speculation.

We are unpersuaded. Section 186.22, subdivision (b)(1) provides for a sentence enhancement when a defendant is convicted of enumerated felonies " ' "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' " (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Hill* (2006) 142 Cal.App.4th 770, 773.) "It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18.)

Here, the gang allegation was supported by substantial evidence. It was undisputed that Mullens was a member of the AFC gang. AFC was embroiled in a gang war with a rival Hispanic gang, 38th Street. Members of the two gangs had engaged in hostilities including fights and escalating to shootings and attempted homicide. The victim was a 19-year-old Hispanic man, who was in AFC territory. Mullens had seen Espinosa repeatedly in the neighborhood and had stared at him the two days prior to the shooting. The gang expert testified that gang members sometimes "stare down" rival gang members who drive through the neighborhood as a form of intimidation. Mullens admitted he sometimes stared at persons he believed to be rival gang members. Thus, the evidence suggested Mullens believed Espinosa was a rival gang member who was repeatedly entering AFC territory. At the very least, the jury could infer Mullens knew Espinosa was a young, Hispanic man who was in his gang's territory, and not an AFC member. Mullens was wearing gang colors when he committed the shooting. The properly qualified gang expert opined that the shooting was committed for the benefit of the gang. Shooting a rival gang member in AFC territory, during a gang war, would enhance the AFC gang's reputation for protecting its turf and discourage further attacks by the rival gang. Even if not committed in furtherance of the gang war, the audacious nature of the shooting, on a main street in broad daylight, would enhance AFC's and Mullens's reputations, furthering the gang's interest in controlling its claimed territory

and continuing its narcotics sales without interference. (See *People v. Romero, supra,* 140 Cal.App.4th at pp. 18-19 [evidence sufficient to support gang enhancement where defendant, a gang member, went to a liquor store in an area controlled by a rival gang, with whom defendant's gang was at war, and shot two persons outside the liquor store without provocation]; *People v. Gardeley, supra,* 14 Cal.4th at p. 619 [sufficient evidence robbery was committed for a gang's benefit where an expert testified the crime was a classic example of a gang member committing a crime to secure its drug-dealing stronghold].) Indeed, there was no apparent reason for Mullens to shoot at Espinosa other than in furtherance of the gang's objectives. The crimes are incomprehensible unless understood as related to gang hostilities. Mullens's theory that he shot in an outburst of "road rage" is not persuasive and, in any event, was a question for the jury, not this court.

3. *Two court security assessments should have been imposed.*

At sentencing the trial court imposed one $20 court security assessment. The People assert that because Mullens was convicted of two crimes, the court should have imposed two $20 assessments. The People are correct.

Section 1465.8, subdivision (a)(1) provides that, to ensure and maintain adequate funding for court security, "a fee of twenty dollars ($20) shall be imposed *on every conviction for a criminal offense* . . . ." (Italics added; *People v. Wallace* (2004) 120 Cal.App.4th 867, 871.) "[S]ection 1465.8 unambiguously requires a fee to be imposed for each of defendant's convictions. Under this statute, a court security fee attaches to 'every conviction for a criminal offense.' " (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865.) Because Mullens was convicted of two offenses, two $20 fees must be imposed, for a total of $40. (*Id.* at p. 866.)

DISPOSITION

The trial court is directed to modify the abstract of judgment to impose a total of two $20 fees (for a total of $40) on defendant, pursuant to section 1465.8. In all other respects, the judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.